No. 87-168

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

RUSSELL FRISBY, *et al.*,
Appellants,

v.

SANDRA C. SCHULTZ, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF APPELLANT, TOWN OF BROOKFIELD

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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BRIEF AMICUS CURIAE OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS IN SUPPORT OF APPELLANT, TOWN OF BROOKFIELD

INTEREST OF THE AMICUS CURIAE

This brief amicus curiae is filed pursuant to Rule 36 of the Rules of this Court on behalf of the more than 1,900 local governments that are members of the National Institute of Municipal Law Officers (NIMLO). Both parties have consented to the filing of this brief and their letters of consent have been lodged with the Court.

NIMLO is a national organization comprised of municipalities and local government units, which are political subdivisions of states. NIMLO is operated by

the chief legal officers of its members, variously called city attorney, county attorney, city or county solicitor, corporation counsel, director of law, and other titles. The Appellant, Town of Brookfield, is a member of NIMLO.

The accompanying brief is signed by the municipal attorneys constituting the governing body of NIMLO, both on behalf of NIMLO and for the political subdivision of the state, territory, or commonwealth of which they are the authorized legal officer thereof.

The local government attorneys who operate NIMLO are responsible for advising their city governments on the best lawful methods for promoting health and safety within their jurisdictions. These attorneys also represent their governments in litigation resulting from the implementation of municipal regulations, such as the non-picketing ordinance before this Court. The United States Court of Appeals for the Seventh Circuit has held that the Town of Brookfield's ordinance prohibiting picketing before or about a residence or dwelling was unconstitutional.

NIMLO believes that the Brookfield residential non-picketing ordinance challenged in this case is a valid exercise of the town's broad municipal police power. The Seventh Circuit's decision does not properly recognize a municipality's broad power to restrict expressive conduct when it interferes with the public good. If allowed to stand, this decision will severely curtail the ability of local governments to use their police powers to foster and protect the health, safety and welfare of their citizens. Accordingly, NIMLO has a significant interest in the issues raised by this case.

STATEMENT OF THE CASE

Amicus adopts the statement of the case and the facts as presented by Appellants.

SUMMARY OF ARGUMENT

Local governments possess the requisite police power to enact ordinances which protect the public, including public safety, health, and welfare (peaceful and quiet enjoyment). The Town of Brookfield ordinance is a valid exercise of that power because it protects the public safety and privacy interests of its residents. The ordinance does not violate the First Amendment in accomplishing its public safety and welfare goals since it is content neutral, is narrowly tailored to serve a significant government interest and leaves open ample alternative channels of communication.

The ordinance is content neutral as it bans all picketing in certain designated areas. It is narrowly tailored to achieve its goal of protecting public safety and welfare concerns because even one picketer would disrupt traffic and tranquility in the neighborhoods.

The U.S. Constitution does not guarantee the right to maximum media coverage of one's views, only the right to express them. Several alternative channels of communication remain open which would not interfere with the interests the ordinance is trying to protect.

Finally, the ordinance is not substantially overbroad as it directly accomplishes its privacy and public safety goals without infringing upon constitutionally protected activities. The ordinance does not operate on a fundamentally mistaken premise. It realistically attempts to regulate conduct that harasses those at home and presents substantial risks to public safety.

ARGUMENT

I. LOCAL GOVERNMENTS MAY REQUIRE THAT PICKETING NOT TAKE PLACE IN RESIDENTIAL AREAS IN ORDER TO ADVANCE PRIVACY AND PUBLIC SAFETY GOALS.

Local governments, by virtue of their police power, may enact ordinances to promote public welfare. *See Berman v. Parker*, 348 U.S. 26, 33-34 (1954). Public welfare is a broad concept which includes "public safety, public health, morality, peace and quiet, [and] law and order." *Id.* at 32-33. An ordinance that advances public welfare but also restricts expressive activities protected by the First Amendment will be upheld if it is a "reasonable time, place, or manner restriction." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). In *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983), the Court determined that restrictions on expression meet the reasonable time, place or manner standard if they are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."[1]

[1] This Court has also used the framework set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968) for determining whether a restriction on expression is valid under the First Amendment. According to *O'Brien*,

> [a] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an importart or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984), the Court determined that the *O'Brien* framework was "little, if any, different from the standard applied to time, place or manner restrictions." (footnote omitted).

Brookfield's ordinance promotes residential privacy, tranquility and public safety by prohibiting picketing at a dwelling or residence. This ordinance is clearly content-neutral and serves significant governmental interests.

The Brookfield ordinance makes it "unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." Brookfield, Wis., Gen. Code § 9.17 (1985). Ordinances that have been struck down for discriminating against picketers based on the content of their expression have afforded preferential treatment to expression on a particular topic.[2] The Brookfield ordinance does not exempt any type of residential picketing from its prohibition. It is, therefore, content-neutral.

By removing picketing activities from residential areas, the Brookfield ordinance seeks to promote the "well-being, tranquility, and privacy" of those at home. Brookfield, Wis., Gen. Code § 9.17 (1985). It

[2] In *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972) the Court invalidated an ordinance which exempted peaceful labor picketing from its ban on picketing at a school. In *Carey v. Brown*, 447 U.S. 455 (1980), the Court invalidated an ordinance for exempting labor picketing from its ban on residential picketing. On the face of these ordinances, preferential treatment was given to labor disputes.

also eliminates an activity that "obstructs and interferes with the free use of public sidewalks and public ways of travel." *Id.* It is well established that a government has a significant interest in protecting public safety, *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981), as well as in protecting the tranquility of the home, *Carey v. Brown*, 447 U.S. 455, 471 (1980). That the Brookfield ordinance serves significant governmental interests is not in question.

Amicus submits that a residential ban on picketing is narrowly tailored to serve these significant governmental interests and leaves open alternative channels of communication.

A. AN ORDINANCE RESTRICTING PICKETING AT RESIDENCES IS NARROWLY TAILORED TO SERVE SIGNIFICANT GOVERNMENTAL INTERESTS.

This Court requires that content neutral time, place, or manner restrictions be narrowly tailored to serve significant governmental interests. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983)

The *Frisby* trial court determined that Brookfield's ordinance was not a narrowly tailored manner of advancing privacy and safety interests. *Schultz v. Frisby* 619 F.Supp. 792, 797 (E.D. Wis. 1985), *aff'd mem.*, No. 85-2950 (7th Cir. April 30, 1987). The court said that "[o]ne can *imagine* neutral time, place, and manner regulations short of a ban on residential picketing, which would go a long way toward the Town's safety and domestic privacy goals . . .An absolute ban, however, against a form of protected speech cannot be permitted to stand." *Id.* (emphasis added).

On several occasions this Court has considered the meaning of "narrowly tailored," and has never invalidated an otherwise constitutional time, place and manner regulation merely because it is possible to "imagine" less restrictive alternatives to achieve a given objective. Amicus submits, therefore, that the decision of the trial court was the result of the court's misapplication of the "narrowly tailored" prong of the time, place or manner test.

In *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), this Court considered whether an ordinance which banned the posting of signs on public property was narrowly tailored to serve the City's interest in reducing blight. The Court of Appeals had invalidated the ordinance because, in its opinion, less restrictive alternatives were available to achieve the City's interests. *Taxpayers for Vincent v. Members of the City Council*, 682 F.2d 847,852 (9th Cir. 1982), *rev'd*, 466 U.S. 789 (1984). The court stated, "Instead of a general ban, the City might regulate the size, design, and construction of the posters . . .institute clean up or removal requirements . . . or provide more stringent regulations for the areas of the City more in need of protection." *Id.* at 852-53. This Court reversed, and did not consider less restrictive alternatives when determining whether the ordinance, as applied, was a narrowly tailored time, place and manner restriction on expression.[3] 466 U.S. at 808-10. The

[3] The Court implied that a "least drastic means" analysis is only appropriate when reviewing a facial challenge based on overbreadth. 466 U.S. at 801.

correct inquiry, this Court determined is, "whether the scope of the restriction on appellee's expressive activity is *substantially broader than necessary* to [serve] the City's [legitimate governmental interest]." 466 U.S. at 808 (emphasis added).

In *United States v. Albertini*, 472 U.S. 675 (1985), the Court again emphasized that a government entity has a degree of leeway in determining reasonable restrictions on speech under the First Amendment. Respondent had received a letter barring him from the Hickam military base and was subsequently convicted of violating a statute prohibiting those who had received such letters from entering a military base. Respondent asserted that the statute violated the First Amendment because its restriction on speech was greater than what was essential to further the government's interest in security. The Court found that barring respondent from Hickam was not "essential" in any absolute sense to the security at the military base. The military presumably could have provided him with a military police chaperone during the open house. This observation, however, provides an answer to the wrong question by focusing on whether there were conceivable alternatives to enforcing the bar letter in this case. The First Amendment does not bar application of a neutral regulation . . . merely because . . . there is some imaginable alternative that might be less burdensome on speech . . . Instead, an incidental burden on speech is no greater than is essential . . . so long as the neutral regulation promotes a substantial government interest *that would*

be achieved less effectively absent the regulation.

472 U.S. at 688-89 (emphasis added).

A regulation is, therefore, narrowly tailored if it is not "substantially broader than necessary," *Vincent*, 466 U.S. at 808, or "promotes a substantial government interest that would be achieved less effectively absent the regulation," *Albertini*, 472 U.S. at 689. The Brookfield ordinance satisfies both the *Vincent* and the *Albertini* tests. Moreover, although this Court has not required that a regulation be the least restrictive way to achieve significant governmental interests, Brookfield's ordinance also satisfies that standard.

The *Frisby* trial court said that the Town's safety concerns could be achieved "by limiting the time of picketing and the number of persons who may picket at one time." *Schultz v. Frisby*, 619 F.Supp. 792, 797 (E.D. Wis. 1985), *aff'd mem.*, No. 85-2950 (7th Cir. April 30, 1987). This reasoning does not take into account the physical layout of the Town's subdivisions or the limited number of traffic safety officers which are available.

Brookfield is a residential suburb with eight police officers and a police chief. *Id.* at 793. It has a subdivision of residential homes with streets that are only thirty feet wide and have no sidewalks, curbs or street lights. *Id.* at 793-94.

In the present case, picketers carried signs and shouted, *Id.* at 795, while standing on streets just wide enough to accommodate one car in each direction, J.A. 49-50. This type of behavior is inherently distracting and posses a significant risk to public safe-

ty. Indeed, the trial court agreed that "[t]he safety of picketers and passers-by is a serious concern where streets are narrow, there are no sidewalks, and traffic may be heavy." *Id.* at 796.

Because picketing increases the risk of traffic hazards, it is similar in this respect to billboards, which are "real and substantial hazards to traffic safety." *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 509 (1981). In *Metromedia* this Court considered whether an ordinance banning most offsite billboards was constitutional. Although the ordinance was ultimately declared invalid for favoring commercial speech over noncommercial speech, the Court said that "we cannot conclude that the City has drawn an ordinance broader than is necessary to meet its interest." 453 U.S. at 512.

Picketers pose a greater threat to public safety than do billboards. They move about, approach those passing by, carry signs and shout their messages, while billboards are stationary. In light of the distracting actions of picketers, the narrow streets, lack of sidewalks, and small police force available to adequately regulate traffic problems, limiting the time and number of picketers would not eliminate the risk to public safety. Brookfield's ordinance restricting picketing to areas other than "before or about" residential dwellings, Brookfield, Wis., Gen. Code § 9.17 (1985), is no broader than necessary to protect public safety.

Another stated purpose of the ordinance is to eliminate the emotional disturbance, distress and harassment caused by picketers to those in their homes. It is well established that a government's "in-

terest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Carey v. Brown,* 447 U.S. 455, 471 (1980). In *Carey,* the Court determined that, although a local government may not discriminate against picketers based on the content of their expression, "[w]e are not to be understood to imply . . . that residential picketing is beyond the reach of uniform and nondiscriminatory regulation." 447 U.S. at 470. "Preserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value. Our decisions reflect no lack of solicitude for the right of an individual 'to be let alone' in the privacy of the home, 'sometimes the last citadel of the tired, the weary, and the sick.' " *Carey,* 447 U.S. at 471, *quoting Gregory v. Chicago,* 394 U.S. 111, 125 (1969).

The *Frisby* trial court determined that Brookfield's interest in protecting its residents from emotional disturbance, distress and harassment while in their homes or in process of ingress thereto or egress therefrom, could be adequately served by limiting picketers to certain hours and by limiting the number of picketers who may congregate at any one time. *Schultz v. Frisby,*619 F. Supp. at 797. The trial court has not considered the disturbing effect that even a restricted number of persons picketing at limited times would have on those captive in their homes. In the present case, the picketers carried signs with emotionally charged slogans and sang and cheered other slogans that made uncharitable references to the father of the family being picketed. *Id.* at 795. Adults and children living in the subdivision found the pick-

eters' activities to be objectionable and/or frightening. (J.A. 50-53). As a result, one neighbor felt compelled to reroute her trips to avoid the picketers, J.A. 76, while a child who had been frightened by the picketers refused to go to destinations near the picketing for a week and a half, J.A. 82-83. Another neighbor was disturbed by the picketers' comments while at her home. (J.A. 58-59). The police subsequently received numerous complaints and reports from the community. (J.A. 50-53). Limiting the hours of picketing and the number of picketers might lessen the harassment and emotional disturbance that such activities inflict upon the residents of the community. This, however, is not sufficient. Residents living in the community have the right to be let alone in the privacy of their homes. Nothing short of a total prohibition of residential picketing can adequately accomplish this goal.

A total ban of expression in a particular place has been upheld as a reasonable time, place or manner restriction. *See Members of the City Council v. Taxpayers for Vincent,* 466 U.S. 789 (1984). In *Vincent,* the Court upheld an ordinance which totally banned the posting of signs on public property. It held that "[b]y banning these signs, the City did no more than eliminate the exact source of the evil it sought to remedy." 466 U.S. at 808. The Court went on to say that "the substantive evil – visual blight – is not merely a possible by-product of the activity, but is created by the medium of expression itself." 466 U.S. at 810.

The harm caused by picketing is not an incidental by-product of the picketing. It is the act of picketing itself that adversely impacts the tranquility of resi-

ential areas. The tactics employed by the picketers in the present case were calculated to harass the picketed family and their friends and neighbors. This type of disturbance is the very problem that the Town of Brookfield is seeking to avoid. The presence of even one picketer engaged in this type of intrusive behavior would disturb the peace and tranquility of home dwellers. Thus, the Town's ordinance, as with the ordinance upheld in *Vincent,* does "no more than eliminate the exact source of evil it sought to remedy." 466 U.S. at 808.

B. AMPLE ALTERNATIVE CHANNELS OF COMMUNICATION REMAIN OPEN WITH A BAN ON RESIDENTIAL PICKETING.

It has long been recognized by this Court that it "is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open." *Kovacs v. Cooper,* 336 U.S. 77, 88-89 (1949). The Town of Brookfield has determined that residential picketing has as its object the harassment of residents "and without resort to such practice full opportunity exists . . . for the exercise of freedom of speech and other constitutional rights." Brookfield, Wis., Gen. Code § 9.17 (1985). Indeed, Appellees have not argued that easy alternative means of publicity are unavailable to them. The basis of Appellees' objection to the ordinance is that other available avenues of communication might not enable them to receive as extensive media coverage and would, therefore, not be the easiest and most effective method of reaching the greatest audience.

This Court has rejected the notion that those wishing to speak are entitled to use the easiest and most effective way to reach the greatest number of people. *See Kovacs v. Cooper*, 336 U.S. at 88-89. Local governments may prohibit intrusions into the home that a home dweller is incapable of avoiding. In *Kovacs*, the Court upheld a municipal ordinance which prohibited trucks from blaring amplified messages throughout the municipality. The Court weighed the need for this particular manner of expression against the loss of tranquility that the activity inflicted upon those in their homes. *Id.* at 86-87. It determined that although "more people may be more easily and cheaply reached by [this expressive activity]" this could not justify the resulting intrusion into a home dweller's sanctuary. *Id.* at 87-89. The Court stated other forums of communication were available which do not have this disruptive effect. *Id.* at 89.

Here, too, other methods of communication are available for the picketers to effectively spread their message in Brookfield's residential areas. As the *Frisby* trial court observed, the picketers "may distribute leaflets in the. . .neighborhood, (*citing Martin v. City of Struthers*, 319 U.S. 141, 146-49 (1943)), they may march past the. . .home [they seek to picket] (*citing Gregory v. Chicago*, 394 U.S. 111 (1969)); and, of course, they may picket other more public sites." *Schultz v. Frisby*, 619 F. Supp. 792, 797 (E.D. Wis. 1985), *aff'd mem.*, No. 85-2950 (7th Cir. April 30, 1987). Not mentioned by the trial court is the opportunity for the picketers to promote their views over the telephone, through door-to-door appeals or through the mail. All of these alternatives are currently available to the picketers and would not significantly, if at all, increase their expenses. Brookfield's ordinance, therefore, satisfies the last prong of the time, place, or manner test and should be upheld under the First Amendment.

II. AN ORDINANCE BANNING PICKETING AT RESIDENTIAL DWELLINGS IS NOT SUBSTANTIALLY OVERBROAD BECAUSE IT DIRECTLY ACCOMPLISHES PRIVACY AND SAFETY GOALS WITHOUT INFRINGING UPON CONSTITUTIONALLY PROTECTED ACTIVITIES.

Appellees have suggested that regardless of whether Brookfield's ordinance may constitutionally be applied to them, it is facially overbroad and must be invalidated.

This Court has indicated that invalidating an ordinance on facial overbreadth grounds is "strong medicine" which should be used "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). When an ordinance regulates activities involving expression plus conduct, its overbreadth "must not only be real but substantial as well, judged in relation to the [ordinance]'s plainly legitimate sweep." *Id.* at 615.

An ordinance is not "substantially" overbroad merely because one might be able to conceive of situations where it infringes upon constitutionally protected expression without contributing to the general welfare of those residing in a municipality. *See New York v. Ferber*, 458 U.S. 747 (1982). In *Ferber*, this Court upheld a statute prohibiting persons from promoting sexual performances by children despite the existence of constitutionally protected activities that would be prohibited. The Court acknowledged

> that some protected expression, ranging from medical textbooks to pictorials in the National Geographic would fall prey to the statute. How often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of the [statute] in order to produce educational, medical, or artistic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguable impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's reach.

458 U.S. at 773.

Here, Brookfield's ordinance is limited to residential areas. Because of the significant governmental interest in protecting public safety and the peace and tranquility of those in their homes, the legitimate sweep of the ordinance encompasses most, if not all, residential picketing. If any impermissible applications of the ordinance exist, they pale in comparison to the ordinance's plainly legitimate reach.

Generally, an ordinance will not be invalidated on substantial overbreadth grounds unless it prohibits a substantial amount of conduct which does not interfere with a legitimate goal of government. *See Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 967-68 (1984). In *Munson*, a statute which imposed a twenty five percent limit on charitable fund raising expenses was struck down as being facially overbroad. According to the Court the statute's overbreadth was substantial because the statute was based "on a fundamentally mistaken premise that high solicitation costs are an accurate

measure of fraud. That the statute in some of its applications actually prevent[ed] the misdirection of funds from the organization's purported charitable goal [was] little more than fortuitous." 467 U.S. at 966-67.

The Brookfield ordinance does not operate on a "fundamentally mistaken premise." It was enacted based on the premise that residential picketing harasses those at home and presents substantial risks to public safety. Brookfield, Wis., Gen. Code §9.17 (1985). It is not "fortuitous" that this ordinance eliminates these problems. The act of picketing before or about residences creates these problems; the ordinance eliminates them.

Because the sweep of the Brookfield ordinance does not encompass a substantial number of impermissible applications, it should not be invalidated on overbreadth grounds.

CONCLUSION

For the foregoing reasons, Amicus respectfully urges that this Court reverse the decision of the United States Court of Appeals for the Seventh Circuit.

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